

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY
NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

DEC 19 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

ANDREW VINCENT BUTTAFUOCO,

Appellant.

2 CA-CR 2008-0154

DEPARTMENT A

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR-200700722

Honorable Bradley M. Soos, Judge Pro Tempore

AFFIRMED

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Attorneys for Appellee

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B R A M M E R, Judge.

¶1 Appellant Andrew Buttafuoco appeals his conviction for human smuggling. Arguing there was insufficient evidence to support his conviction, he contends the trial court abused its discretion in denying his motion for judgment of acquittal. We affirm.

Factual and Procedural Background

¶2 On appeal, we view the evidence, and all reasonable inferences therefrom, in the light most favorable to sustaining Buttafuoco's conviction. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On the morning of April 27, 2007, Buttafuoco and a friend transported for profit five illegal aliens in a large sport utility vehicle (SUV) from southern Arizona to the Phoenix area. While Buttafuoco was driving on the interstate toward Phoenix, Department of Public Safety (DPS) Officer Lee Bradshaw noticed the windshield of Buttafuoco's SUV was cracked and initiated a traffic stop. Although Bradshaw initially saw only Buttafuoco and two passengers in the SUV, when he approached the vehicle, he noticed a fourth person lying in the footwell behind the front seats, attempting to hide. Bradshaw also noticed several more individuals lying on the floor behind the second row of seats, "like they were trying to stay hidden."

¶3 Bradshaw discovered in Buttafuoco's SUV a total of five Hispanic individuals who were disheveled, covered in dirt and plant debris, and who spoke no English. All five were later determined to be illegally in the country and subsequently were deported. Although neither Buttafuoco nor his passengers had significant amounts of money with them

at the time of the traffic stop, that fact, as well as the passengers' appearance and the manner in which they were transported, was consistent with commercial smuggling arrangements.

¶4 In May 2007, a grand jury charged Buttafuoco with human smuggling, in violation of A.R.S. § 13-2319. After a two-day trial, a jury convicted Buttafuoco as charged. The trial court suspended imposition of sentence and placed Buttafuoco on four years' supervised probation. This appeal followed.

Discussion

¶5 As his sole argument on appeal, Buttafuoco asserts the trial court abused its discretion in denying his motion for judgment of acquittal. A judgment of acquittal is appropriate only when "there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). Evidence may be direct or circumstantial, but if reasonable minds can differ on inferences to be drawn therefrom, the evidence must be considered substantial and the case submitted to the jury. *See State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004); *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). On appeal, we review the denial of a motion for a judgment of acquittal for an abuse of the trial court's discretion and will only reverse if there are no probative facts to support the conviction. *See State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007). That is, we will reverse only if it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶6 Pursuant to § 13-2319(A), a person commits smuggling if he “intentionally engage[s] in the smuggling of human beings for profit or commercial purpose.” The “[s]muggling of human beings” is defined as “the transportation, procurement of transportation or use of property or real property by a person or an entity that knows or has reason to know that the person or persons transported or to be transported are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state.” § 13-2319(D)(2).

¶7 At the close of the state’s evidence at trial, Buttafuoco moved for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. He asserted, inter alia, that the state had presented “no proof whatsoever [that he had intended to receive] any monetary benefit” from transporting the illegal aliens. In response to the motion, the state contended Buttafuoco’s “profit motive” had been “proven circumstantially.” Analogizing the need to prove Buttafuoco’s commercial purpose in transporting the aliens to proving a defendant’s intent to sell drugs in a “possession for sale” prosecution, the court reasoned that Buttafuoco’s “intent c[ould] be inferred from the facts and circumstances[and] need not be proven by direct sensory proof.” In denying Buttafuoco’s motion, the court concluded that, “based on the quantity of the individuals [Buttafuoco had transported] and the fact that they were hidden in the vehicle and the [other] circumstances presented[,] the State certainly d[id] present at least a case of circumstantial evidence as to the profit or commercial element.”

¶8 Buttafuoco asserts on appeal the trial court abused its discretion in denying his motion for judgment of acquittal because, he contends, “[n]o evidence whatsoever was proffered by the State of any profit or commercial purpose.” As the state notes, a conviction of smuggling may be supported partially or wholly by circumstantial evidence. *See Landrigan*, 176 Ariz. at 4, 859 P.2d at 114; *State v. Green*, 111 Ariz. 444, 446, 532 P.2d 506, 508 (1975) (“There is no distinction in the probative value of direct and circumstantial evidence.”); *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005) (“The substantial evidence required for conviction may be . . . circumstantial.”). Relying on *State v. Barragan-Sierra*, 534 Ariz. Adv. Rep. 3 (Ct. App. July 17, 2008), the state contends the circumstances surrounding Buttafuoco’s transportation of the illegal aliens support an inference he was transporting them for profit.

¶9 The defendant in *Barragan-Sierra* was convicted of conspiracy to commit human smuggling and argued on appeal the conviction violated the corpus delicti doctrine because the state had presented no evidence, independent of his incriminating statements, establishing he had agreed to pay money to another person to transport anyone illegally. *Id.* ¶ 11. Division One of this court affirmed the defendant’s conviction, concluding the circumstances of the transportation—that five illegal aliens had been found hiding under a carpet in the bed of a truck, that they had appeared tired and dirty, and that some of them fled when law enforcement officers stopped the truck—was sufficient independent evidence to support a reasonable inference that the defendant had been engaged in a commercial

smuggling operation. *Id.* ¶ 15. Here, the circumstances of Buttafuoco’s transportation of the illegal aliens indicated: Buttafuoco was transporting illegal aliens in a high-occupancy SUV, they were dirty, disheveled, and had plant debris in their hair, Buttafuoco had picked them up in the early morning hours and was transporting them from an area near the border to the Phoenix area, and they were hiding on the floor of Buttafuoco’s SUV. As the court in *Barragan-Sierra* concluded, given such circumstantial evidence, “Arizona jurors would not need an expert to [reasonably] conclude that a group of illegal aliens was being transported into the United States as part of a for-profit or commercial arrangement.” *Id.*; *cf. State v. Harrison*, 111 Ariz. 508, 510, 533 P.2d 1143, 1145 (1975) (details and circumstances surrounding defendant’s possession of drugs sufficient to support inference he possessed drugs “for sale”).

¶10 Here, moreover, the jury did have the benefit of an expert. Bradshaw testified he had “been working the interstate . . . for about nine years” and had conducted “at least” a hundred traffic stops involving commercial human smuggling. He stated that, in his experience, persons smuggled illegally tend to appear “disheveled[and] dirty” with “plant debris in their clothing and their hair” after “spending quite a few nights out in the desert.” The individuals hiding in Buttafuoco’s SUV all fit that description. Although Buttafuoco had no “money on [him]” during the traffic stop, Bradshaw testified he believed Buttafuoco was engaging in human smuggling for profit because it was “the norm” for people engaged in

smuggling for profit “to not have money on them” because “they don’t get paid until delivery is made.”

¶11 Buttafuoco does not contend the trial court abused its discretion in admitting Bradshaw’s testimony. *See* Ariz. R. Evid. 702 and 704; *cf. State v. Keener*, 110 Ariz. 462, 466, 520 P.2d 510, 514 (1974) (qualified expert may properly testify that, based on circumstances, defendant likely possessed drugs “for sale”); *State v. Fornof*, 218 Ariz. 74, ¶ 21, 179 P.3d 954, 959-60 (App. 2008); *State v. Carreon*, 151 Ariz. 615, 616-17, 729 P.2d 969, 971-72 (App. 1986). Nonetheless, Buttafuoco insists this evidence was insufficient to support a conclusion that he had intended to profit from transporting the illegal aliens. But he neither cites to, nor have we found, authority supporting his position. *See Barragan-Sierra*, 534 Ariz. Adv. Rep. 3, ¶ 15; *cf. State v. Arce*, 107 Ariz. 156, 160-62, 483 P.2d 1395, 1399-1401 (1971) (circumstantial evidence, as well as law enforcement officer’s expert testimony that circumstances indicated defendant possessed drugs for purpose of selling them sufficient to support possession for sale conviction); *State v. Webster*, 170 Ariz. 372, 373-74, 824 P.2d 768, 769-70 (App. 1991) (fact that defendant had twenty-six pieces of crack cocaine and wore pager, as well as officer’s testimony that drug dealers frequently carry that amount of drugs and wear pagers, sufficient evidence to support possession for sale conviction). That other inferences may be drawn from the evidence or that conflicting evidence may have existed are issues for the jury to resolve. *See State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d

43, 46 (App. 2004). We do not reweigh the evidence on appeal. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶12 Based on the circumstances surrounding Buttafuoco’s transportation of the illegal aliens and Bradshaw’s testimony that these circumstances suggested Buttafuoco was transporting them for profit, sufficient evidence existed to permit the inference that Buttafuoco had engaged in a for-profit smuggling arrangement. Although the jury just as reasonably could have determined otherwise, a case must be submitted to the jury if reasonable minds can differ on inferences to be drawn from the evidence introduced at trial. *See Landrigan*, 176 Ariz. at 4, 859 P.2d at 114. “A trial judge has no discretion to enter a judgment of acquittal in such a situation.” *Id.* We, therefore, affirm Buttafuoco’s conviction for human smuggling in violation of § 13-2319.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge